No. 94-380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOE ALFRED IZEN, JR., CONROE OFFICE BUILDING, LTD., AND L.T. BRADT,
Petitioners,
v.
JOHN FLOYD NICHOLS and DEENA COUNTS NICHOLS,
Respondents.

Petition for Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

John Floyd Nichols and Deena Counts Nichols, Respondents herein, filed bankruptcy on December 11, 1987, under Chapter 7 of the United States Bankruptcy Code. On May 4, 1988, the Nichols were discharged from bankruptcy. Joe Alfred Izen, Jr., L. T. Bradt and Conroe Office Building, Ltd., Petitioners herein, did not file a complaint challenging the dischargeability of their claim against the Nichols. Consequently, Petitioners' pre-petition claims against the Nichols, if any, were discharged. Thereafter, on April 11, 1990, Martha Mackin Izen, former wife of Joe Alfred Izen, Jr., filed a legal malpractice cross-

claim[1] against John Nichols, her divorce attorney. Prior to the filing of the cross-claim, Martha Izen assigned 50% of her legal malpractice case against Nichols to Joe Izen. Subsequently, Martha Izen settled her claims and dismissed her malpractice case. The only remaining legal malpractice claims against Nichols are asserted by Izen pursuant to his assignment from Martha Izen.

On August 21, 1992, the Honorable Manuel D. Leal, United States Bankruptcy Judge for the Southern District of Texas, entered a Memorandum Opinion and Judgment wherein the bankruptcy court explained that 11 U.S.C. § 524 of the United States Bankruptcy Code bars prosecution of pre-petition claims against the Nichols and that the claims made by the Petitioners arose prior to the filing of the Nichols' bankruptcy and, therefore, were barred from further prosecution. Judge Leal then concluded that if Petitioners persisted in pursuing the Nichols, then sanctions may be in order. Petitioners refused to be dissuaded by the statutory bar to the continuation of their lawsuit, and appealed the bankruptcy court's judgment to the Honorable Sim Lake, United States District Court Judge for the Southern District of Texas, Houston Division. Judge Lake remanded the matter back to Judge Leal for significant further findings of fact, which could, and in all likelihood will, entail additional evidentiary hearings to determine the unresolved issues. Petitioners then proceeded to attempt to appeal the remand order of Judge Lake to the Fifth Circuit Court of Appeals. However, the Fifth Circuit Court of Appeals refused to

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[1] Petitioners had filed a State court lawsuit against John Nichols and Martha Izen for conversion of monies which allegedly belonged to Conroe Office Building, Ltd. The details of the trials and tribulations of the instant parties are eloquently set forth in the district court's Memorandum and Order attached as Appendix "C" to the Petition for Writ of Certiorari which is incorporated by reference herein.

entertain the appeal because the court concluded it lacked jurisdiction. *In re Nichols*, 21 F.3d 690 (5th Cir. 1994).

SUMMARY OF THE ARGUMENT

Despite Petitioners' pleas and protestations to the contrary, the Fifth Circuit Court of Appeals' dismissal for lack of jurisdiction is consistent with *Connecticut National Bank v. Germain*[2]. In an attempt to cover all possible bases, the Petitioners alternatively contend that "the Fifth Circuit refused to recognize that the District Court's order 'continued' the Bankruptcy Court's previous injunction for purposes of Section 1292(a)(1)," and then later assert that "[District] Judge Lake's Order is either final or Interlocutory" and, therefore, "[t]he Court of Appeals had jurisdiction in any event, whether under Section 1291 or Section 1292."

However, in the process of reaching its decision, the Fifth Circuit Court of Appeals *sua sponte* systematically evaluated all three grounds[3] for the Petitioners to invoke its jurisdiction and "conclude[d] that the district court's order remanding the case to the bankruptcy court was neither a final appealable order nor an appealable interlocutory order" which left the court without jurisdiction to entertain the Petitioners' premature appeal.

The reasoning of the court of appeals lacks the convolutions with which the Petitioners attempt to imbue it to create a conflict with *Germain*. Quite simply, the court of appeals determined that the district court's disposition of the Petitioners' appeal from the bankruptcy court was not a final

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[2] 503 U.S. ____, 112 S.Ct. 1146 (1992).

[3] 28 U.S.C. §§ 158, 1291 and 1292.

order. The district court affirmed the bankruptcy court only to the extent of that which remained after four broad issues were remanded for further findings of fact and conclusions of law.[4] What remained after the remand, for the purpose of this Court's consideration, was simply the statutory injunction under 11 U.S.C. §524, to which all post-discharge bankrupts are entitled by law.

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[4] The district court's Final Judgment is attached as Appendix "B" to the Petition for Writ of Certiorari at pages 10a and 11a. For convenience, the four issues on remand to the bankruptcy court are:

(1) whether John Nichols' objection to the withdrawal of funds in the registry of the Fort Bend County court, allegedly filed without the advice and consent of his client, Martha Mackin Izen, and in conflict with her interest, was a post-petition act of malpractice, and, if so, whether it can be discharged;

(2) whether Martha Mackin Izen had sufficient notice or knowledge of the Nichols' bankruptcy to permit discharge of her malpractice claims;

(3) whether John Nichols' alleged wrongful interference with the converted funds in the registry of the Fort Bend County court was a post-petition independent tort against appellants, and, if so, whether it can be discharged; and

(4) why the bankruptcy court refused to modify its discharge order to permit the appellants to pursue Nichols' insurer.

ARGUMENT AND AUTHORITY

A. No Final Appealable Judgment

Both 28 U.S.C. §158(d) and 28 U.S.C. §1291 require a final judgment for purposes of review by the courts of appeal. In the case *sub judice*, as the court of appeals correctly concluded, there was no final judgment. The district court's order of remand requires extensive and significant further findings of fact and conclusions of law which are dispositive to the issues raised by Petitioners.

As the Fifth Circuit previously noted in *In re Bowman*, 821 F.2d 245 (5th Cir. 1987), a district court order which remands the case back to the bankruptcy court judge for significant further proceedings is not appealable under 28 U.S.C. §158(d). Other circuit courts have also reached the same conclusion, observing that "[a] remand for significant further proceedings includes one requiring de novo hearings [or] additional findings of fact concerning dispositive issues in the case [and, therefore,] cannot be considered final and immediately appealable." *In re Jones*, 9 F.3d 878, 879 (10th Cir. 1993) *citing Homa, Ltd. v. Stone (In re Commercial Contractors, Inc.)*, 771 F.2d 1373, 1375 (10th Cir. 1985) and *Balcor Pension Investors V v. Wiston XXIV Ltd. Partnership (In re Wiston XXIV Ltd. Partnership)*, 988 F.2d 1012, 1013 (10th Cir. 1993).

Additionally, the district court's order of remand was not final even in the context of the bankruptcy proceeding, because it did not "finally dispose of *discrete disputes within the larger case*. *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1283 (2nd Cir. 1990)(quoting *In re Johns-Manville Corp.*, 824 F.2d 176, 179 (2nd Cir. 1987) and *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir.

1983)(emphasis therein))." *In re Fugazy Express, Inc.*, 982 F.2d 769, 775 (2nd Cir. 1992). The *Fugazy* court went on to explain:

> By "disputes" we do not mean merely competing contentions with respect to separable issues; rather, we apply the same standards of finality that we apply to an appeal under 28 U.S.C. § 1291. (citation omitted). Given the strong federal policy against piecemeal appeals, (citations omitted), a "dispute," for appealability purposes in the bankruptcy context, means at least an entire claim on which relief may be granted.

Id., at 775-76. Viewed in this context, there is not even a discrete dispute which remained before the district court for appellate review or which had been ultimately resolved by the bankruptcy court. Thus, the court of appeals' determination that there was no final judgment from which Petitioners could perfect their appeal under either 28 U.S.C. §158(d) or 28 U.S.C. §1291 should be beyond question.

B. No Appealable Interlocutory Judgment

Turning to the only other avenue of appeal, the question presented to the court of appeals was whether there was a basis for an interlocutory appeal. Undeniably, the Petitioners have neither requested, nor been granted, leave to file an interlocutory appeal, pursuant to either 28 U.S.C. § 158(a) or 28 U.S.C. § 1292(b). Thus, the only determination left is whether 28 U.S.C. § 1292(a)(1) is applicable.

Petitioners contend that the district court's partial affirmance "continued" the bankruptcy court's injunction.

However, it is important to note specifically what is the nature of the injunction of which Petitioners complain. The bankruptcy court's Memorandum Opinion[5] states in pertinent part:

> A debtor's discharge, once obtained, is protected by the injunctive provisions contained in 11 U.S.C. § 524. That section states:
>
> (a) A discharge in a case under title--
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

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[5] The Memorandum Opinion is attached as Appendix "E" to the Petition for Writ of Certiorari and the above quoted language is found at 45a-46a.

And the bankruptcy court then proceeded to apply the statutory mandates to the specifics of this case, noting:

> John Nichols' Chapter 7 discharge operates as a injunction against the continuation of the state court suit, or any suit initiated as a result of the same facts, against John Nichols for the purpose of collecting, recovering or offsetting the claims raised in the state court suit as a personal liability of John Nichols. 11 U.S.C. §§ 524(a), 727; *In re Bouchelle*, 98 Bankr. 81 (Bankr. M.D. Fla. 1989).

The district court's partial affirmance simply acknowledged the existence of the statutorily imposed injunction and in no way granted, continued, modified, dissolved or refused to modify or dissolve an injunction which would invoke 28 U.S.C. § 1292(a)(1).

While the Petitioners contend that the district court's partial affirmance in essence "continued" the Section 524 injunction, the preponderance of authority would conclude otherwise. The Second Circuit in *Fugazy*, observed:

> An order that "continu[es]" an injunction is one that "extends the duration of the injunction," 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3924, at 84 (Supp. 1992), that is, one entered in circumstances where, " ' without such order, the injunction would stand dissolved by lapse of the time fixed in the original order.' " *Sierra Club v. Marsh*, 907 F.2d [210] at 213 [(1st Cir. 1990)] (quoting *Dreutzer v. Frankfort Land Co.*, 65 F. 642, 644 (6th Cir.

> 1895)). Thus, "to be classified as an 'order[] ... continuing' an injunction, a ruling must have a direct and demonstrable effect on the duration of a previously-issued injunction. In other words, the later order must extend or prolong the restraint." *Sierra Club v. Marsh*, 907 F.2d at 213.

In re Fugazy Express, Inc., 982 F.2d at 777. Since the district court order does not purport to alter the injunction, and, indeed, could not extend the effective period of the injunction granted by 11 U.S.C. § 524, then Petitioners' basis for an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) is equally untenable.

CONCLUSION

Just because the court of appeals found no appellate jurisdiction does not mean that there is a conflict with *Germain*. In *Germain*, this Court concluded that "[s]o long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction." *Id.*, 112 S.Ct. at 1150. Fundamental to the exercise of appellate jurisdiction is the requirement that the facts meet the conditions imposed by statute invoking jurisdiction. Petitioners neither meet the conditions imposed by 28 U.S.C. §§ 158, 1291, nor 1292. As a result the Fifth Circuit Court of Appeals denial of jurisdiction was correct.

Therefore, Respondents John Floyd Nichols and Deena Counts Nichols would respectfully request that the Petition for Writ of Certiorari of Joe Alfred Izen, Jr., Conroe Office Building, Ltd. and L. T. Bradt be denied.

Respectfully submitted,

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